APPELLATE CIVIL.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

SONATUN SHAH AND OTHERS (DECREE-HOLDERS) *v.* ALI NEWAZ KHAN AND ANOTHER (JUDGMENT-DEBTORS). * 1889 *January* 31.

Transfer of Property Act (IV of 1882). ss. 88, 90—Decree unsatisfied by sale of mortgaged property—Right to decree for sale of other than mortgaged property.

The holder of a decree on a mortgage obtained an order under s. 88 of the Transfer of Property Act for sale of the mortgaged property, and the proceeds of this, when sold, being insufficient to satisfy the decree, he applied for a decree under s. 90 for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge refused the application on the ground that there was no such provision in the order for sale under s. 88. *Held*, that the decree-holder was entitled to the decree asked for. The terms of s. 90 contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, he can ask for and obtain a decree under s. 90 for realization of the balance from other properties of the debtor (1).

IN this case the decree-holders obtained, on the 5th December 1879, a decree on a mortgage executed in their favour by the judgment-debtors: and on 25th February 1885, they obtained a decree for sale of the mortgaged property under s. 88 of the Transfer of Property Act (IV of 1882). Under that decree the mortgaged property was sold, but the proceeds of sale were insufficient to satisfy the amount due under the mortgage decree, and they then applied for an order under s. 90 of the Act for realization of the balance from the other property of the judgment-debtors; and on this application the Subordinate Judge made the following order:—

"The judgment-debtors in this case have objected that there being no order in the decree executed for the realization of the decretal amount from the person or other property of the judgment-debtors, the present application for execution against the property of the judgment-debtors

* Appeal from Order No. 401 of 1888, against the order of Baboo Promotha Nath Banerjee, Subordinate Judge of Mymensingh, dated the 4th of September 1888.

(1) See *Gopal Das* v. *Ali Muhammad*, I. L. R., 10 All., 632.

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other than the property mortgaged is not tenable. It is admitted by the pleader for the decree-holder, and it also appears from the decree filed, that a decree enforcing the lien on the mortgaged property was obtained by the decree-holder on the 5th December 1879, *i.e.*, previous to the passing of the Transfer of Property Act (IV of 1882), and that the decree-holder prayed for an order for the sale of the mortgaged property in a subsequent suit under the provision of Act IV of 1882. The decree obtained in the latter suit (a copy of which has been filed) shows that there is simply an order for the realization of the decretal amount from the sale of the mortgaged property, and it does not contain any order for the realization of the balance, if any, of the money due from the person or the other property of the judgment-debtors : consequently I am of opinion that the decree-holder cannot proceed against the other property of the judgment-debtors without such an order. Rule 12 framed by the High Court under the provision of s. 104 of the Transfer of Property Act directs that every decree for sale under the Act shall direct that if the proceeds of the sale shall not be sufficient to satisfy the decree, the defendant (mortgagor) shall personally pay the amount of the deficiency (see p 735, Appendix B of Macpherson's Law of Mortgage, 7th Edition, and p. 168, para. I of Belchambers' Rules and Orders of the High Court.) It has been held by the Allahabad High Court [see *Pran Kuar* v. *Durga Prasad* (1)], and also by the Bombay High Court [see *Budan* v. *Ram Chandra Bhunjgaya* (2)] that a decree upon a mortgage which only provides for its enforcement against the hypothecated property cannot be executed against the person or other property of the judgment-debtor. It has also been held by the Bombay High Court in the case above quoted that a decree cannot be extended in execution beyond the real meaning of its terms. The pleader for the decree-holder contended that he has obtained the latter decree under the provision of s. 67 of Act IV of 1882, and that the provision of s. 90 of the Act is applicable to it ; but the said section shows that if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Court may pass a *decree* for such sum ; it cannot make an order in the execution department for the recovery of such sum. My predecessor in office, who decided the case, might have passed a decree for the recovery of any such sum. For all these reasons, I allow the objection with costs, and strike off the execution case as being unsustainable."

From this order the decree-holders appealed to the High Court.

Baboo *Hem Chunder Banerjee*, Baboo *Mohini Mohun Roy*, and Baboo *Kashi Kant Sen* for the appellants.

Munshi *Seraj-ul-Islam* for the respondents.

(1) I. L. R., 10 All., 127. (2) I. L. R., 11 Bom., 537.

The judgment of the Court (PRINSEP and GHOSE, JJ.) was as follows:—

The appellant obtained a decree within the terms of s. 88 of the Transfer of Property Act for sale of the mortgaged properties. These properties, when sold, failed to realize the amount of the mortgage debt. The mortgagee, decree-holder, accordingly made an application somewhat vaguely expressed, but evidently intended to ask for a decree within the terms of s. 90 of the Transfer of Property Act for the sale of other properties belonging to the judgment-debtor. The Subordinate Judge has refused to make any decree or order under s. 90, considering himself in some manner restricted by the action of his predecessor in passing the previous decree under s. 88. We think that this is a mistaken view of the law. The terms of s. 90 in our opinion clearly contemplate a decree in the suit for recovery of the mortgage money after sale of the mortgaged properties under a decree given under s. 88. The decree-holder can then apply to the Court, and if he can show that, after the sale of the mortgaged properties, there is still a balance due to him under the decree obtained under s. 88, and that that amount is legally recoverable from the judgment-debtor, mortgagor, he can ask for and obtain a decree within the terms of s. 90 for realization of the balance from other properties of the debtor. We accordingly set aside the order of the Subordinate Judge, and if we had before us sufficient materials, we should ourselves have passed a decree under s. 90. But in the absence of sufficient information, we think it right to set aside the order of the Subordinate Judge and to direct that, after making the necessary enquiries, he do pass a decree under s. 90, and then allow the execution to proceed. It is not necessary, as contended by the respondents' vakeel, to bring a separate suit for this matter. We give no costs in this appeal.

J. V. W. *Appeal allowed.*

Before Mr. Justice Tottenham and Mr. Justice Banerjee.

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SHAMA DASS (PLAINTIFF) *v.* HURBUNS NARAIN SINGH AND OTHERS (DEFENDANTS).*

Appeal—Ex parte decree—Order setting aside ex parte decree—Civil Procedure Code (Act XIV of 1882), *ss.* 108, 588—*Notification in "Gazette."*

There is no appeal from an order setting aside an *ex parte* decree.

THIS was an appeal against an order setting aside an *ex parte* decree, on the ground that the summons had not been served upon the defendants.

Mr. *Bonnerjee* and Baboo *Umakali Mookerjee* for the appellant.

Mr. *C. Gregory* and Baboo *Romesh Chunder Bose* for the respondents.

Mr. *Gregory* took a preliminary objection that there was no appeal from such an order.

The following judgments were delivered by the Court (TOTTENHAM and BANERJEE, JJ.)

TOTTENHAM, J.—This is an appeal against an order passed by the lower Court setting aside an *ex parte* decree.

A preliminary objection was taken on the part of the respondents by Mr. Gregory, that from such an order no appeal lies under s. 588 of the Code.

This question was argued at considerable length; and reserving our judgment upon it, we also heard the appeal on the merits. Upon consideration, I am of opinion that Mr. Gregory is right, and that no appeal lies. When Act XIV of 1882 was passed, the wording of s. 588, cl. 9, was to this effect: "Orders rejecting applications under s. 108, or an order to set aside a decree *ex parte*." Under this clause, apparently an appeal would lie from the order now before us; but I find that the word "or" in the clause after s. 108 was by an error placed for the word "for." In August 1882, that is, one month after the Act came into force, a corrigendum was

* Appeal from Order No. 434 of 1888, against the order of Baboo Rakhal Chunder Bose, Subordinate Judge of Shahabad, dated the 13th of August 1888.

published in the *Gazette of India*, under the signature of the Secretary to the Government in the Legislative Department, by which it was notified that the word "for" ought to have stood for "or" in this clause. I think I am justified in taking judicial notice of this notification and acting upon it. It is true that the amending Act (VII of 1888) assumes the original wording of the clause to have been correct, for the Act deliberately provides that the word "for" shall stand in the place of "or;" but in the statement of objects and reasons, which accompanied the Bill when framed, it was stated that the amendment of this clause was only intended to correct a typographical error. It is clear to me, therefore, that the Legislature never intended to enact that there should be an appeal from an order setting aside a decree passed *ex parte*.

That being so, I allow the preliminary objection in this case and dismiss the appeal with costs.

BANERJEE, J.—I also am of the same opinion. I think that the Code of Civil Procedure, even as it stood previous to the passing of the amending Act (VII of 1888), did not allow any appeal from an order granting an application for setting aside an *ex parte* decree.

It was contended that cl. 9 of s. 588, as it stood before the amendment by Act VII of 1888, allowed such an appeal. If that clause stood alone, this contention would have been right. But that is one of a series of clauses; and regard being had to the context, and especially to the language of cl. 8, which immediately precedes, it is clear that the word "or" in cl. 9 is a misprint for the word "for." Orders against which appeals are provided for by s. 588 are invariably referred to in the plural number, and where more descriptions of orders than one are provided for in one and the same clause, they are connected by the word "and," and not by the disjunctive particle "or." Clause 14 may be referred to in this connection. Referring to the state of the law as it stood before the passing of Act XIV of 1882, we find the same view supported; for cl. 9 of Act XII of 1879, which in other respects agrees word for word with the clause now under consideration, has the word "for" in the place of the word "or," thereby indicating that

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the Legislature then allowed appeals only against orders rejecting applications for setting aside *ex parte* decrees, and not against orders allowing such applications. And going further back, and referring to Act VIII of 1859, we find that the state of the law was the same under that Act. The reason of the thing would show that there is no ground for thinking that the Legislature intended to make any change in the law; for whereas an order rejecting an application for setting aside an *ex parte* decree leaves the party against whom the order is passed without any further remedy except an appeal against that order; an order allowing an application for setting aside an *ex parte* decree, leaves the party against whom the order is made ample remedy by prosecuting his suit, in which, if he is in the right, he may yet succeed. All this was conceded in argument; and the learned Counsel for the appellant admitted that, if the construction of this clause depended merely upon a construction of s. 588, the preliminary objection would be almost unanswerable. But it was contended that the Legislature, by having recourse to the process of legislation for the purpose of altering the word "or" into "for," has shown that we are no longer at liberty to suppose that it was a misprint for "for." I do not see much force in this contention. All that the Legislature did was only to guard against any possibility of error in construing s. 588; and, as my learned brother has shown, a reference to the statement of objects and reasons for making the change in question shows that what the Legislature meant to do was merely to correct a typographical error. If that is their express object, there is no force in the argument that we must presume their object to have been to alter the law and make it by the amending Act something different from what it was originally intended to be.

T. A. P.

Appeal dismissed.